

1                   IN THE UNITED STATES DISTRICT COURT FOR THE  
2                   DISTRICT OF HAWAII  
3   'ILIO'ULAOKALANI COALITION,       )   CIVIL NO. 04-00502DAE  
4   a Hawaii nonprofit                )  
5   corporation; NA 'IMI PONO, a       )  
6   Hawaii unincorporated             )  
7   association; and KIPUKA, a         )  
8   Hawaii unincorporated             )  
9   association,                        )  
10                   Plaintiffs,       )  
11                   vs.                )  
12                   DONALD H. RUMSFELD, Secretary   )  
13                   of Defense; and Les Brownlee,   )  
14                   Acting Secretary of the U.S.    )  
15                   Department of the Army,        )  
16                   Defendants.                     )  
17                   \_\_\_\_\_  
18                   ORAL ARGUMENT

12                   TRANSCRIPT OF PROCEEDINGS  
13                   BEFORE THE HONORABLE DAVID ALAN EZRA,  
14                   UNITED STATES DISTRICT JUDGE

14   APPEARANCES:

15   For the Plaintiffs:               DAVID L. HENKIN, Esq.  
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**EXHIBIT 8**

1 APPEARANCES (Continued):

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20 Official Court Reporter:

Cynthia Fazio, RMR, CRR  
United States District Court  
P.O. Box 50131  
Honolulu, Hawaii 96850

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25 Proceedings recorded by machine shorthand, transcript produced  
with computer-aided transcription (CAT).

1 kind of preempt what I'm sure will be a request for rebuttal,  
2 they would argue that they have 28 important projects to go  
3 forward with and that they went up to the Ninth Circuit  
4 believing each and every one of those 28 projects was  
5 essential. That as a result of the ruling by the Ninth  
6 Circuit, which they obviously disagree with but nonetheless are  
7 bound by, that they have pared this down to only five projects  
8 that they're asking to go forward with.

9           So, their -- their argument is going to be that they  
10 have made a significant concession to the ruling and they're  
11 not coming back here suggesting to this court that I ought to  
12 allow each one of these 28 projects to go forward on national  
13 security grounds on the basis that somehow the sliding scale,  
14 which by the way still applies in this case, that's regardless  
15 of what stage of the proceedings we're on. In the Ninth  
16 Circuit this court must apply a sliding scale in determining  
17 whether an injunction is appropriate. That is, the likelihood  
18 of success on the merits versus the degree of the irreparable  
19 harm. And their argument is that they've -- and I'm asking you  
20 this because I want you to address it.

21           MR. HENKIN: Sure.

22           THE COURT: Just as I had something I wanted them to  
23 address. That they've pared this down to just five projects.

24           MR. HENKIN: My first response with respect to the  
25 paring down, and I might add it's five construction projects

1 plus training. And we went at great lengths in our briefs to  
2 attach all of the discovery responses that define with  
3 particularity what that training is because our first response  
4 to Your Honor's question is, obviously everything that is not  
5 on that list of allegedly critical actions should continue to  
6 be enjoined. And to the extent that this court allows any  
7 Stryker training to proceed, and we did indicate some limited  
8 training that we --

9 THE COURT: No, I don't think that -- look, there's  
10 absolutely no question about it, Mr. Henkin, to the extent that  
11 the Army has not come forward on the projects that they have  
12 said they are not asking this court to allow them as a matter  
13 of necessity to move forward with, the Ninth Circuit's  
14 injunction will remain in place unless otherwise lifted. They  
15 would have to come back to this court or to the Ninth Circuit  
16 if appropriate, depending upon where we are --

17 MR. HENKIN: Yes, Your Honor.

18 THE COURT: -- to get that injunction lifted. So they  
19 have effectively abandoned for the immediate future, not for  
20 the purposes of this entire case, but for the purposes of this  
21 proceeding, any argument that this court ought to allow them to  
22 go forward with any of those projects other than the five.

23 So to the extent, and I think this has to be  
24 understood, to the extent that the Army has not asked to move  
25 forward with 23 of the 28 projects, those projects will not

1 move forward.

2 MR. HENKIN: Yes, Your Honor, I appreciate that. We  
3 believe it's also and we would respectfully ask the court to  
4 order with specificity based on the information --

5 THE COURT: Oh, my order will be specific.

6 MR. HENKIN: Okay. Because, for example, at  
7 Pohakuloa, in the category of training, which as you may recall  
8 when we came before you in November, they just said we want  
9 these projects plus training. And then we said: Well, what  
10 training? They excluded in their responses any training at any  
11 of the 24,000 acres purchased from Parker Ranch, they excluded  
12 any training in very sensitive habitat at Pohakuloa, and that's  
13 good that they don't believe that that's necessary because  
14 otherwise a lot of endangered species would be imperiled.

15 So when the court -- and we've been careful to assume  
16 that what they mean by "training" is specifically what they  
17 have disclosed is necessary. But everything else should be  
18 enjoined.

19 THE COURT: Well, this court doesn't have jurisdiction  
20 over United States Army training which has nothing to do with  
21 with the Stryker Brigade.

22 MR. HENKIN: This is Stryker training, Your Honor,  
23 that was disclosed in EIS as part of the overall project --

24 THE COURT: To the extent that the 25th Infantry  
25 Division or somebody else is out there training and that has

1 nothing to do with Stryker, that's not part of this case if it  
2 doesn't have anything to do with Stryker.

3 MR. HENKIN: I guess I'd respectfully disagree with  
4 respect to the 24,000 acres that were purchased specifically as  
5 part of Stryker training. With respect to the rest of  
6 Pohakuloa --

7 THE COURT: I'm not talking about that.

8 MR. HENKIN: Okay.

9 THE COURT: I'm talking about the other areas where  
10 they have been training previously.

11 MR. HENKIN: Yes, Your Honor. Now, back to your  
12 question. They've pared things down from the entirety down to  
13 specific projects and specific training. That helps the  
14 parties and the court focus on the appropriate scope of  
15 injunctive relief. And I guess if we were in a bargaining  
16 session, parties, as they often do, would look at the  
17 litigation risk and figure out how much they're going to give.

18 But in terms of this court because --

19 THE COURT: In my -- in my dreams, Mr. Henkin --

20 MR. HENKIN: It is a matter of public record --

21 THE COURT: -- that the parties -- that the parties  
22 could resolve this other than my making a decision, but I'm  
23 afraid not.

24 MR. HENKIN: Well, Your Honor, it is a matter of  
25 public record that we have asked them to have that opportunity

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COURT REPORTER'S CERTIFICATE

I, CYNTHIA FAZIO, Official Court Reporter, United States District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify that the foregoing pages numbered 1 through 91 is a correct transcript of the proceedings had in connection with the above-entitled matter.

DATED at Honolulu, Hawaii, January 5, 2007.

/s/ Cynthia Fazio  
CYNTHIA FAZIO, RMR, CRR